United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1340

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P/S

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Respondent-Appellee,

-against-

HARVEY KORNBLUTH,
Petitioner-Appellant.

Appeal from Criminal Conviction in the United States District Court for the Eastern District of New York

Appellant's Brief

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CASES CITED

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BRIEF FOR APPELLANT

STATEMENT

a. Nature of Appeal

This is an appeal by the defendant-appellant, Harvey Kornbluth, from a conviction in the United States District Court for The Eastern District of New York.

b. Prior Proceedings

Defendant-appellant was convicted by a jury on June 3, 1975 of making a willfully and materially false statement on an application to a Federal Deposit Insurance Company, Insured Bank in violation of 18 U.S.C. 1014 and of conspiracy in that he conspired to make this bank application in violation of 18 U.S.C. 371. The trial was presided over by Judge Henry Bramwell. That the defendant-appellant and one Thomas Ragusa (hereinafter called co-defendant) were charged with the above offenses in an indictment sealed December 19, 1973 and opened March 14, 1974.[1](1) Pursuant to request of defendant-appellants prior attorney and in response to co-defendants motions the government served and filed Bills of Particulars (6 and 9).

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[1] Numbers in parenthesis indicates Index to Record on Appeal.

Paragraphs 4 and 10 respectively set forth the non-existance of material which is exculpatory i.e. "Brady Material." On May 28, 1975 (Transcript of Testimony, incorrectly dated May 27, 1975) the government turned over to the defense "a two page report concerning an interview of Peter Michael Frappollo..... as probable Brady Material." (p 3 L 16-22).[2] The said document was marked as Government's Exhibit 3 for Identification (P3 L 19). The indictment alleges that on or about April 23, 1973 Defendant-Appellant submitted to the First National Bank of East Islip an application for a loan which was willfully and materially false in that it stated that Defendant-Appellant was employed by M.B.E. Associates 140 Cherry Valley Avenue, West Hempstead, New York for four and one half years, at an annual salary of twenty four thousand plus dollars and that the purpose of the loan was to purchase a certain motor vehicle. The second count of the indictment alleged a conspiracy between Defendant-Appellant, co-defendant and "others, both to the Grand Jury known and unknown" to submit the alleged false application to the bank. Government's Exhibit 3 for Identification is a report of an FBI interview of Peter Michael Frappollo. The said report indicated that Frappollo gave information to the Federal Bureau of Investigation which was opposed to the allegations of the indictment on May 25, 1973. Frappollo told the Federal Bureau of Investigation that "about a month ago" he met Defendant-Appellant "who was looking for a car to buy." Frappollo also told the Federal Bureau of Investigation that day that he "knew of a car for sale and called Jimmy Hadjilazou and since he had a car for sale maybe they could do business." The statements of Frappollo are completely at odds with the testimony of the government's witnesses supporting the allegation that Defendant-Appellant did not

[2] Numbers in parenthesis indicating Page and Line refer to the Transcript of Testimony of the record on appeal.

intend to purchase an automobile. The existance of this witness was suppressed. The defendant-appellant's motion for a dismissal (P 36 et seq) was denied. The court held that the defendant-appellant was not prejudiced "in that Mr. Frappollo will be available and may be called by the defendants if they require him. "Therefore, the motion to dismiss as to Harvey Kornbluth is denied" (P 39 L 2 - 6). The promised appearance of Frappollo was not to be, despite the repeated reassurance on May 29, 1975 by the government that "he should be available to the defense if they want him." (P227 L 20 - 21). Frappollo was not produced after repeated demands to produce him were made. There were repeated assurances that the witness would be present.

The government's trial brief (8) set forth the issue it recognized to be its burden to prove. To sustain the allegations to wit:

"That the defendant made statements on the application knowing them to be false" (at P 3) and "simply whether at the time he made the false statement on the application, the defendant did so with <u>the intent</u> ..." (emphasis so in original) that Frappollo could offer evidence on the issue of intent which was favorable to the defendant. Appellant was recognized by the court below:

> "THE COURT: It is quite involved, but it is material which the defense can use.
>
> MR: LEFKOWITZ: Yes.
>
> THE COURT: No question.
>
> MR: LEFKOWITZ: And if you look at Government's Exhibit 3 for identification, which is the statement of Peter Frappollo, your Honor will see the diametically opposed statement there of this witness.
>
> THE COURT: It is evident, counsel.
>
> MR: LEFKOWITZ: I beg your pardon?
>
> THE COURT: It is evident.

MR; LEFKOWITZ: That it is diametically opposed?

THE COURT: Yes."

(P 247 L 3 - 15)

Although the court recognized Frappollo's value to the defense it would not dismiss the indictment based upon the governments failure to produce Frappollo as promised in its attempt to overcome the prejudice created by its failure to disclose the "Brady Material" in the Bill of Particulars.

The government's case was presented upon the theory that defendant-appellant owed certain monies and arranged to borrow from a bank, with the assistance of others, upon a representation that the monies were to be used to purchase a certain automobile. No direct proof was offered to indicate any prior arrangement to intentionally misstate defendant-appellant's employment and salary information. Only as to the intent to purchase an automobile did the government attempt to adduce proof of a prior arrangement (P 194 L 6 - 7) which proof was from a person who conceeded he was advised of being a potential subject of prosecution and made an arrangement with the government (P 210 L 16 - 21). It was this evidence that the suppressed "Brady Material" would have rebutted.

c. Questions Presented

i) Did the government's failure to disclose exculpating material in its Bill of Particulars and suppression thereof until the trial was commenced deprive the defendant-appellant of due process of law?

ii) Was the defendant deprived of due process of law when the government did not meet its obligation to produce Peter Michael Frappollo?

iii) Did the government prove a charge of conspiracy beyond a reasonable doubt?

POINT I

THE GOVERNMENTS ADMITTED NON-DISCLOSURE OF THE EVIDENCE OF THE STATEMENT OF PETER MICHAEL FRAPPOLLO REVEALED IN THE TRIAL BELOW IS COGNIZABLE BY THIS COURT AND REQUIRES REVERSAL OF THE CONVICTION.

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83 (1963) at 87, see also United States v. Wilkens, 326 F.2d 135 (2d Cir. 1964)

Rule 16 of the Federal Rules of Criminal Procedure reflect this modern liberal trend.

The prosecutor's argument that the material was neutral is erroneous and does not suffice to excuse the failure to furnish the defense with the evidence earlier or to corredt the efror by producing Peter Frappollo as promised. This suppression deprived the appellant of due process of law. See Giglio v. United States 405 U.S. 50 (1972) United States v. Keough 391 F.2d 138, 146 - 47 (2d Cir. 1968). When the prosecutor states that ".... the material must tend to exculpate, not be neutral... interview is in essence, such neutral material it neither adds nor detracts from the Government's case" (P 33 L 16 -32) he fails to meet the issue of "Brady" which refers to evidence which adds to the defense case. Concededly Frappollo did not add to the Government's case. However, Frappollo could have given testimony adding to the defendant-appellant's case and material to overcome a verdict showing guilt. The materiality of the suppressed statement to the defense was clear and acknowledged by the court below (P 247 L 3 - L 15 quoted supra).

Frappollo told the Federal Bureau of Investigation that the defendant-appellant was looking to purchase a car.

Suppressed evidence need not be completely exculpatory; it need only be necessary to the defendant's preparation for trial on some material issue. United States v. Polisi 416 F. 2d 573, 577 (2nd Cir. 1969). If evidence is to be of any use to the defendant at all, it must "be made available to him far enough in advance of trial to allow him sufficient time for its evaluation, preparation and presentation..." United States v. Pastin 320 F.Supp. 275, 285 (E.D. La. 1970). See also Hamdic v. Bailey, 486 F. 2d 390 (4th Cir., 1967). United States v. Cullen, 305 F.Supp. 695 (E.D. Wis., 1969). Any favorable evidence may be strengthened by corroboration discovered by means of additional investigative work.

> The defendant in essence only needs to show that "there is a significant chance that the evidence, developed by skilled counsel could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

Corso v. United States, 389 F. Supp. 659 (1974). See also United States v. Kahn 472 F.2d 272, 287, United States v. Miller 411 F2d 825, 832 (2d Cir. 1969) United States v. Seijo, 514 F.2d 1357 (1975). This matter falls in the line of cases where the suppression by the prosecutor may not have been deliberate but where hindsight discloses that the defense could have put the evidence to substantial use. That is the evidence was both favorable and relevant to the defense.

Where the attorneys might have put the evidence to use it must be concluded that the suppression of the evidence constitutes denial of due process of law. Giles v. Maryland 386 U.S. 66, See Mooney v. Holohan 294 U.S. 103, Napue v. Illinois 360 U.S. 264. In State of West Virginia v. George R. Cowan (Supreme Court of Appeals of West Virginia) 197 S.E. 2d 64) it was held that the issue of prosecutorial non compliance with a pre trial discovery order should not be determined on basis of type of evidence withheld by the prosecution; rather whether the failure to disclose is a fatal non

compliance depends on its prejudicial effect on preparation and presentation of the defendants case.

The genesis of Brady is founded upon the concept and therefore the incorporation of "fair play" into the constitutionally mandated requirement of a fair trial. The rationale herein is that no person should stand convicted of a crime under circumstances where the Government was in possession of undisclosed evidence which might tend to exculpate the defendant. See People v. Bennett, 75 misc. 2d 1040 (N.Y.S. Supreme Court Case decided in 1974): Though there seems to be no disagreement with the principle of law enunciated in Brady and Giles, the application of the aforementioned rule in our adversary system poses difficult problems which the prosecutor failed to overcome. The prosecutor further "muddied" his obligation by his promise to produce Peter Frappollo for the defense. At page 36, Line 13 we find the following colloquy "Mr. Lefkowitz: "...since he has this witness under subpoena, I most certainly want him produced in Court...

The Court: He will arrange that.

Mr. Barlow: I will certainly do that.

The Court: Mr. Barlow will arrange for that." (see Prosecutor's Duty to Disclose, 52 Marq. L. Rev. 516, Brady v. Maryland and the Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112.

There is no question herein about the requested Brady material. The prosecution agreed to turn over the material and to produce the witness but though the failure to produce Peter Frappollo may not have been deliberate, the prosecutor's promise of deliverance was tantamount to a "duty owed" Especially since the court acted in reliance thereon (P 245 L 1 - P 246 L 2). It was the prosecutor's negligence in failing to produce the witness

Peter Frappollo which appearance might have tended to balance the scales of justice.

As the learned jurist Judge Cardozo said in Palsgraf v. Long Island R.R. Co., 248 N.Y. 339

> "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation;,it is risk to another or to others within the range of apprehension."

In seeking a workable solution the scales of justice must balance. The prosecutor's actions became negligent because it involved the invasion of a legally protected interest i.e. the violation of a right; in this case the right to have Peter Frappollo testify. The orbit of danger was perceived by the prosecutor for he promised to produce this vital witness and thus he was in the orbit of a duty owed. In the United States v. Bond, 334 F.Supp. 1025 (1971) the court stated "...that Brady created no right of pretrial discovery, that its obligation under Brady is to conduct criminal prosecutions fairly and its conduct in that regard must be examined after trial, not before."

The prosecutor's suppression here is tantamount to "deliberate" which includes not merely a considered decision to suppress, taken for the very purpose of obstructing justice but one where the prosecutor's acts deviate so from the norm as to be grossly negligent of the defendant's rights. How does a prosecutor justify relying that the witness will be subject to his attorneys' phone call? One cannot or should not provoke an answer to improper argument and then claim error when an answer is given. The prosecutor's failure lies in his deliberate actions of failing to have Peter Frappollo under proper subpoena. The prosecutor for his convenience was able to produce witnesses from as far away as Pennsylvania i.e. both Morano and Hadjilazou. The high value of Peter Frappollo as evidence for

the defense could not have escaped the prosecutor's attention.

Certainly this was all testimony which comes within the ambit of those cases which require the vacating of a conviction where the suppressed evidence "may have had an effect upon the outcome of the trial", Napue v. Illinois, supra, at 272, or where the "evidence... may reasonably be considered admissible and useful to the defense" Barbee v. Warden, 331 F.2d (4th Cir. 1964), or where the suppressed matter is "information impinging on a vital area in (the) defense", U.S. v. Maroney, 319 F.2d 622, 627 (3rd Cir. 1963) or "pertinent facts relating to the defense", Curran v. Delaware, 259 F.2d 707, 711 (3rd Cir. 1958), or is evidence which is vital "to the accused persons in planning and conducting their defense" Ashley v. Texas, 319 F.2d 80, 85 (5th Cir. 1963). See also Giles v. Maryland, supra;, People v. Savidges, 1 N.Y. 2d 554, 556-557, 136 N.E. 2d 853, 854; Brady v. Maryland, supra;, Pyle v. Kansas, 317 U.S.213 (1942); Levin v. Katzenbach, 363 F.2d 287 D.C. Cir. (1966). In the last cited case the court held that reversal was required where the suppressed evidence "might have led the jury to entertain a reasonable doubt about Appellant's guilt". This is a case where the suppressed evidence would have undoubtedly led the jury to entertain a doubt about appellant's guilt. See also Griffin v. U.S., 336 U.S. 704 (1949); Mesarosh v. U.S. 352 U.S. 1 (1956); U.S. v. Zborowski, 271 F.2d 661 (2nd Cir. 1959); Berger v. U.S., 295 U.S. 78 (1935). This is not a case in which the constitutional error was "so unimportant and insignificant that . . .(it) . . . may be deemed harmless, not resulting in the automatic reversal of the conviction", Chapman v. California, 87 Sup.Ct. 824, rehearing denied 87 Sup. Ct. 1283 (1966), since the suppressed evidence would have been of prime importance in corroborating the defense's theories. In Levin, supra, negligent suppression was deemed sufficient to require reversal. See United States v. Keough, supra.

POINT II

THE GOVERNMENT'S NON-PRODUCTION OF PETER FRAPOLLA WAS A CONSTITUTIONAL ERROR WHICH WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

In Chapman v. State of California, Supra Justice Black set forth the judicial standard for determining when a constitutional error may be deemed harmless,not resulting in the automatic reversal of a conviction. The court held that

> ". . . before a Federal Constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt."

In Lollar v. U.S. 376 F.2d 243 (D.C. Cir , 1976) the Court said

> "We hold, therefore, that only where 'we can find no basis in the record for an informed speculation that appellant's rights were prejudicially affected', can the conviction stand. Anderson v. United States, 122 U.S. App. D.C. 277, 279, 352 F.2d 945, 947 (1965); Shelton v. United States, 120 U.S. App. D.C. 65,66,343 F.2d 347,348, cert. denied, 382 U.S. 856 (1965). In effect, we adopt the standard of 'reasonable doubt,' a standard the Supreme Court recently said must govern whenever the prosecution contends the denial of a constitutional right is merely harmless error. Chapman v. California, Supra. Such a standard is clearly appropriate in the present context as well, where to find prejudice is to decide that the defendant has been denied effective assistance of counsel. When measured against this standard, the record in the present case fails to convince beyond a reasonable doubt that appellant was not prejudiced because of the joint representation.
>
> Concededly the indicators of prejudice are not very strong; but they are troublesome enough to lead to 'an informed speculation' that Lollar may have been actually prejudiced."

The Court in Levin v. Clark, supra, stated:

> "The Government suggests that the trial court's ruling must be 'clearly erroneous' before we reverse. Although, for reasons stated below, we think the trial court's error is clear, we do not think the

> 'clearly erroneous' standard is applicable.... (I)n Jackson v. United States, 122 U.S. App. D.C. 324, 326, 353 F.2d 862, 864 (1965), we said 'in reviewing facts ...courts apply the "clearly erroneous" standard....' Here, we are not reviewing facts. There is no dispute about what evidence the prosecutor failed to reveal. The only question is what legal conclusion follows from this failure. We must review the trial court's legal conclusion in the same way we review any other legal conclusion of trial court." (emphasis supplied)

Likewise, in the instant case there is no dispute about what evidence the prosecutor failed to reveal. The government cannot contend that their failure to reveal it was not deliberate and that the failure to turn it over to the defense was a harmless error. The prosecutor is called upon to produce not only physical and oral material within his possession or under his control, but also any such material or person concerning which he has knowledge of.

As the Court in Levin, supra, further stated:

> "Nor is it possible to know whether revelation of the evidence would have changed the configuration of the trial — whether defense counsel's preparation would have been different had he known about the evidence, whether new defenses would have been added, whether the emphasis of the old defenses would have shifted. Because the standard requires this kind of speculation we cannot apply it harshly or dogmatically."

It was not the prosecutor's prerogative to decide which witnesses had to be believed and thus disclosed. Any doubts should have been resolved in favor of full prior disclosure. Upon failing to disclose and then offering to cure by production of the witness, the government should have had the witnesses physically present in court as promised. It certainly cannot be said that the prosecutors complied with their constitutionally imposed obligations when they failed to disclose prior to trial the

existance of Peter Frappollo, compounded by his unavailability after disclosure during trial. A system of justice which demands that the prosecutor disclose exculpatory evidence must require the correction of the injustice non-disclosure creates, as in the instant case.

POINT III

THE TRIAL COURT ERRED WHEN IT FAILED TO DISMISS THE COUNT OF CONSPIRACY.

It is true that the existance of a conspiracy may be proved by circumstantial evidence of particular acts. In People v. Kennedy, 32 NY 141, 146 the court stated circumstantial evidence

> "consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist; but the process is fatally vicious, if the circumstance from which we seek to deduce the conclusion depends itself upon conjecture."

In United States v. Ross 92 U.S. 281 the court said

> "They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally if not universally, inadmissible, No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed."

See also Pereira v. United States 347 U.S. 1, Looney v. Metropolitan R. Co., 200 U.S. 480, 488. The evidence in the trial record does not link defendant-appellant to a conspiracy to commit a violation of 18 USC 1014. It is totally unjudicial to infer that because Defendant-Appellant allegedly owed money that he would conspire to commit a crime to obtain finances to repay a debt. These circumstances actually are colorless as to direct

evidence of a conspiracy. An inference is made that he owed money and based upon that inference he allegedly conspired to defraud. It is untenable to sustain this position as a matter of law. Every inference must stand upon some clear fact or direct submission and not upon some other guess or surmise.

Therefore, the well settled rule that where the prosecution relies wholly upon circumstantial evidence to establish the guilt of the accused, the circumstances must be satisfactorily established and must be of such a character as, if true, to exclude to a moral certainty every other hypothesis except that of the accused's guilt. See Richardson on Evidence, Tenth Edition, page 119, Ingram v. United States, 360 U.S. 672. Not only must all of the circumstances be consistent with and point to the accused's guilt, "but they must be inconsistent with his innocence." People v. Fitzgerald, 156 N.Y. 253, 258, 50 N.E. 846, 847. This moral certainty rule is intended to merely reemphasize that guilt be established beyond a reasonable doubt, a reemphasis to be deemed extremely urgent when evidence as exists here is so ethereal, to be so speculative as to be wholly circumstantial.

CONCLUSION

IN LIGHT OF THE FOREGOING, THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR IN THE ALTERNATIVE THE APPELLANT SHOULD BE GRANTED A NEW TRIAL.

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Rotz et Silver

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 10 day of December 1975 deponent served the within Affidavit upon: U.S. Attorney for the Eastern District of N.Y.

attorney(s) for Resp

in this action, at 225 Cadman Plaza East Brooklyn, N.Y. 11201

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Robert Bailey

Sworn to before me, this 10
day of Dec., 1975

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976